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William August

April 18, 2007

via Federal Express & Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o 9300 East Hampton Drive
Capitol Heights, MD 20743

In re: MB Docket No. 05-311; Comments of the Towns and Cities of Abington, Belchertown, Brockton, Brookline, Canton, Dartmouth, Dedham, Easthampton, Groveland, Newton, Northborough, Northampton, Southborough, Sudbury, Taunton, Westwood, Wilmington, Massachusetts; the Towns of Amherst, Londonderry and Windham, New Hampshire and Access Centers, In the Matter of Further Notice of Proposed Rulemaking, Implementation of Section 621(a) of the Cable Communications Policy Act of

Dear Secretary Dortch:

Enclosed please find an original and four (4) copies of Comments in the above-captioned proceeding, MB Docket No. 05-311, Further Notice of Proposed Rulemaking in the Matter of Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, as filed by the municipalities and access centers referenced above.

Thank you for your attention to this matter. Please do not hesitate to contact us if you have any questions whatsoever.

Very truly yours,

William August

Peter J. Epstein

Enc.
cc: Commenting Parties

Before the
Federal Communications Commission
Washington, D.C. 20554

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)	
In the Matter of)	
Further Notice of Proposed Rulemaking;)	MB Docket No. 05-311
Application of Report & Order in)	April 18, 2007
Implementation of Section 621(a) of)	
Cable Communications Policy Act of)	
1984 to Existing Franchisees and)	
Franchise Renewals)	

**COMMENTS OF THE TOWNS AND CITIES OF ABINGTON, BELCHERTOWN,
BROCKTON, BROOKLINE, CANTON, DARTMOUTH, DEDHAM,
EASTHAMPTON, GROVELAND, NEWTON, NORTHBOROUGH,
NORTHAMPTON, SOUTHBOROUGH, SUDBURY, TAUNTON, WESTWOOD,
WILMINGTON, MASSACHUSETTS, THE TOWNS OF AMHERST,
LONDONDERRY AND WINDHAM, NEW HAMPSHIRE AND ACCESS CENTERS**

The Towns and Cities of Abington, Belchertown, Brockton, Brookline, Canton, Dartmouth, Dedham, Easthampton, Groveland, Newton, Northborough, Northampton, Southborough, Sudbury, Taunton, Westwood and Wilmington, Massachusetts; and Amherst, Londonderry and Windham, New Hampshire (the “Franchising Authorities” or the “Municipalities”), the Massachusetts Chapter of the Alliance for Community Media, the Northeast Region of the Alliance for Community Media, Boston Community Access and Programming Foundation, Inc., Cambridge Community Television, Inc., Haverhill Community Television, Inc., Waltham Community Access Corporation, Worcester Community Cable Access, Inc. and Bedford Cable Television (the “Access Centers”) (collectively “the Commenting Parties”), hereby submit comments in response to the above-captioned Federal Communications Commission (“FCC”) Further Notice of Proposed Rulemaking in MB Docket No. 05-311 (the “Further Notice”). The Municipalities are responsible for cable television franchising and regulation and therefore have a substantial and direct interest in proposed changes to the cable franchising renewal process. The

Access Centers are responsible for local Massachusetts and New Hampshire community cable television facilities governed by cable franchises, and therefore also have a substantial and direct interest in the proposed changes to the cable franchising renewal process.

For the reasons stated herein, the Commenting Parties oppose proposals in the Further Notice to grant existing cable franchisees the relief granted to new franchise applicants under the FCC's March 5, 2007 Report and Order in this docket (the "Order"). The Commenting Parties respectfully urge that the FCC's proposals are inconsistent with the letter and spirit of the Cable Act; are not in the public interest; and, notwithstanding the FCC's findings with respect to initial cable franchising, are not applicable to renewal franchising.

1. **FCC's Barrier to Entry Analysis Is Not Applicable to Renewals**

Throughout its Order granting relief to telephone companies and other new entrants to cable service markets, the FCC emphasized that its paramount reason for granting such relief was to promote competition by new entrants by removing so-called "barriers to entry." Order at ¶ 1. The Order was based on the FCC's interpretation of Section 621(a)(1) of the Communications Act, 47 U.S.C. § 541(a)(1), concerning initial franchising, and the rulings adopted in the Order are specifically, and entirely, directed at "facilitat[ing] and expedit[ing] entry of new cable competitors into the market for the delivery of video programming, and accelerat[ing] broadband deployment" (Order at ¶ 1). That analysis has no relevance to incumbent cable operators. Existing franchisees have already entered and are serving the market. Therefore, granting incumbents the relief provided for new entrants will in no way serve the primary public purpose (removing barriers to entry) sought by the FCC in its Order on initial franchising.

2. **FCC Imposition of New Renewal Timetables
Would Be Inconsistent With Cable Act**

The Order imposed a new ninety (90) day, abbreviated process for initial franchising, in order to facilitate competition (Order at ¶ 66). Abbreviating the timelines for renewal franchising would be plainly inconsistent with the Cable Act, which specifically contemplated renewal franchising commencing three (3) years prior to franchise expiration. 47 U.S.C. 546(a)(1) (providing for commencement of process to ascertain community renewal needs during the six month period commencing 36 months prior to franchise expiration). By providing that parties could enter a renewal proceeding as early as 36 months prior to franchise expiration, Congress enabled franchising authorities to conduct competent and informed proceedings for ascertaining community cable needs, drafting complex franchise documents, conducting regular negotiating sessions, and switching from informal negotiations to a formal franchising process. FCC abbreviation of renewal franchising timelines would frustrate the plain intent of Congress to provide for a comprehensive, deliberative, informed franchising process with up to 36 months for complex renewal proceedings.

3. FCC Regulation to “Deem Franchise Granted” Would Violate Cable Act

The Order provides that in the event a local franchising authority has not issued an initial franchise within ninety (90) days, the cable operator may in any event build and operate a cable system under a franchise “deemed granted” pursuant to operation of the FCC’s new regulations (Order at ¶ 77). The Commenting Parties believe that the foregoing FCC regulation glaringly violates the Cable Act by enabling cable operators to operate without an actual franchise, and by creating a fiction that the franchise can be “deemed” granted. The “deemed granted” framework is inconsistent with and prohibited by the Cable Act, because the underlying foundation of the Cable Act is that a cable operator must obtain an actual franchise prior to operating a cable system (except where Congress created an exception to this rule with respect to certain franchise transfers). 47 U.S.C. 541(b)(1). Accordingly, the Commenting Parties believe the FCC would compound a

serious error of law by applying its new Order to renewal franchising by adopting regulations deeming renewal franchises granted in the absence of actual franchise issuance. Such a framework would result in cable operators providing cable service without a required franchise.

4. The FCC Should Defer to State Law in States With Pre-Existing Renewal Regulations

In its Order, the FCC has already acknowledged that it did not have an adequate basis for a finding that its proposed rules and findings would work better than existing state law. See Order at footnote 2. Accordingly, the Order expressly allows state laws on initial franchising to remain intact, to the extent such state law governs impacted franchising matters. Order at footnote 2. As the Further Notice on renewal is based on a much more limited record than its inquiry into initial franchising, it is clear that the FCC will likewise lack an adequate basis for making findings about preemption of state renewal law. Accordingly, in the event the FCC adopts rules pertaining to franchise renewal, the FCC should clarify that state law renewal franchising rules and decisions (like state law initial franchising rules and decisions) remain intact notwithstanding any FCC adoption of new limitations on local renewal proceedings. It is important to note that the FCC has adduced no evidence indicating problems with existing state law governance of renewal franchising. Decades of experience actually demonstrate successful renewal franchising activity is the norm, not the exception. The FCC should therefore not interfere with a well functioning system. Massachusetts is a strong example of a state with a well-defined state renewal franchising system as articulated in specific state franchising regulations, 207 Code of Massachusetts Regulations 3.05 (Franchise Renewal Procedures); 207 CMR 3.06 (Franchise Renewal Grant or Denial); and Mass. Gen. Laws. Ch. 166A, Section 13, and franchising decisions thereunder. In addition, New Hampshire has an existing statute that specifically addresses franchising and renewal. See R.S.A. Chapter 53-C. The Commenting

Parties believe that considering preemption of such pre-existing state law would be inappropriate. The FCC clearly lacks any basis for such finding.

5. Proposal Would Weaken Municipal Franchising Powers and Result in Costs and Harm to the Public

The existing municipal franchising framework has resulted in valuable benefits to the public, including negotiation of service area, cable system build-out, Institutional Network and Public, Educational and Governmental (“PEG”) Access support and facilities. The Order impinges on municipal franchising powers by reducing municipal discretion to define service area and build-out requirements; reducing municipal discretion to negotiate additional PEG Access and INet benefits, and reducing municipal discretion to implement level playing field requirements. Inevitably, municipalities and the general public will experience a reduction in benefits now negotiated during the franchising process. This attenuation of public benefits would be exacerbated by application of the Order to renewal franchising. The FCC should not undermine an existing franchise renewal process that has generated so many public benefits deemed useful to communities by local officials and the general public. Further, the FCC cannot rationally or legally undertake to weaken municipal powers without first assessing and quantifying the value of the public benefits generated by the existing legal framework. Clearly, the FCC has not undertaken any serious effort to quantify and value such benefits.

Further, the existing municipal franchising framework has generated the involvement of thousands of cable committee volunteers in the cable renewal process, in large part because the existing framework provides for meaningful franchise negotiation and franchise oversight. Most Massachusetts communities have volunteer cable committees with years of experience and expertise; committee members share their expertise in cable oversight, at no cost to the municipality. The FCC’s proposed encroachments on municipal franchising powers will make

participation in the renewal process more difficult, indeed meaningless, for local volunteers, and will reduce such volunteer interest in participation in the process.

6. Customer Service Standards Should Not be Preempted

The Commenting Parties strongly endorse the Further Notice's tentative conclusion (at para. 142) that Section 632(d)(2) (47 U.S.C. § 552(d)(2)) bars the FCC from “preempt[ing] state or local customer service laws that exceed the Commission’s standards,” and from “preventing LFAs and cable operators from agreeing to more stringent [customer service] standards” than the FCC’s.

The Commenting Parties note that many communities that already have more than one cable operator see no need to eliminate customer service standards. These communities report continued benefit from and the need to retain customer service standards. Any proposal to preempt customer service standards is contrary to the public interest. Communities continue to experience cable customer service complaints even where there is head-to-head competition between franchised cable operators. Preemption of local customer service standards would therefore be against the public interest, and would be inconsistent with the Cable Act, Section 632(d)(2).

7. The FCC Further Notice Does Not Give Adequate Notice of Scope of or Basis for Proposed Application of Initial Franchising Rules to Renewal Franchising

The Commenting Parties are concerned that the Further Notice does not include draft regulations for changing the statutory renewal process, but merely requests comments on general statements to the effect that the FCC’s initial franchising “findings” should be applicable to existing cable franchisees. This creates a rulemaking process in which rules may be adopted without meaningful

public notice of the specific content of possible future rules, and without even providing reasonable notice of the intended general scope of the rulemaking. Order at para. 139. The scope of the Further Notice is too ambiguous and vague for parties to meaningfully comment on a reasonable basis for a change in the renewal process.

The Further Notice states as potential grounds for new renewal rules that the cable industry trade association reports “if the Commission establishes franchising relief for new entrants, we should do the same for incumbent cable operators because imposing similar franchising requirements on new entrants and incumbent cable operators promotes competition.” The FCC observes that “The record does not indicate any opposition by new entrants to the idea than any relief afforded to them should be afforded to incumbent cable operators.” Order at para. 139. These general assertions are clearly not supported by empirical evidence of any need for changing decades-old renewal practices. Notwithstanding this lack of evidence, the FCC “tentatively concludes that the findings of this Order should apply to cable operators that have existing franchising agreements.” Id. The FCC reaches its tentative conclusion based on perceived interests of the cable and telephone industries, without meaningfully considering municipal franchising needs. The Commenting Parties believe that the Further Notice lacks balanced, meaningful, and statistically significant evidence showing problems with the renewal process. The FCC therefore is not yet in a position even to have reached a tentative conclusion in this matter. With respect to methodology used in consideration of the record in this rulemaking, the Commenting Parties urge that FCC findings in these important matters must be based on statistically reliable, accurate data, not anecdotal evidence.

8. Support for Comments of National League of Cities, U.S. Conference of Mayors, National Association of Telecommunications Officers and Advisors.

The Commenting Parties note their support for and adopt the comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Alliance for Community Media, and the Alliance for Communications Democracy, filed in response to the Further Notice.

9. Conclusion

The Commenting Parties welcome cable competition. They have a long history of working diligently, and in partnership with cable operators to facilitate market entry on fair and reasonable terms. Indeed, over the past decades of cable franchising, municipal franchising authorities have consistently sought competition in cable markets, and actively continue to do so. The FCC's concern with easing market entry is unfairly based on anecdotal evidence about perceived barriers to entry, notwithstanding the fact that decades of cable franchising experience actually prove that the vast majority of municipalities and cable operators have used the existing legal framework to effectively and reasonably promote competition and fair franchising during initial and renewal franchising. Moreover, the FCC's stated goal of promoting competition by changing renewal rules is ill-conceived, as incumbent franchisees are already providing market services. The existing system works well by enabling cable operators and municipal officials reasonable procedures to negotiate renewal franchises that are mutually beneficial to cable operators and to the communities they serve. This has created a sense of partnership between municipalities and cable operators that actually redounds to the benefit of cable operators and the general public. The current renewal franchising system has worked well, and the FCC is acting rashly by proposing to change renewal rules on its own initiative. Moreover, the FCC is preempted in changing renewal rules that are statutory. The FCC's proposal would weaken local

control of franchising, reduce localism in the media, reduce community benefits from cable franchising and conflict with longstanding principles of preserving localism in cable franchising. The Commenting Parties urge the FCC to discontinue the Further Notice and leave intact the existing franchise renewal framework.

Respectfully submitted by,

Town of Abington, Massachusetts
Town of Belchertown, Massachusetts
City of Brockton, Massachusetts
Town of Brookline, Massachusetts
Town of Canton, Massachusetts
Town of Dartmouth, Massachusetts
Town of Dedham, Massachusetts
City of Easthampton, Massachusetts
Town of Groveland, Massachusetts
City of Newton, Massachusetts
Town of Northborough, Massachusetts
City of Northampton, Massachusetts
Town of Southborough, Massachusetts
Town of Sudbury, Massachusetts
City of Taunton, Massachusetts
Town of Westwood, Massachusetts
Town of Wilmington, Massachusetts
Town of Amherst, New Hampshire
Town of Londonderry, New Hampshire
Town of Windham, New Hampshire
Massachusetts Chapter of the Alliance for Community Media
Northeast Region of the Alliance for Community Media
Bedford Cable Television
Boston Community Access and Programming Foundation
Cambridge Community Television
Haverhill Community Television
Waltham Community Access Corporation
Worcester Community Cable Access TV

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